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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-207

MARVIN R. COLE, ARTHUR A. FISCHER AND COLE, FISCHER & ROGOW, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-23a) is not yet reported.

The opinion of the district court is reported at 325 F. Supp. 763.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1972 (Pet. App. B, p. 24a). A petition

for rehearing was denied on July 6, 1972 (Pet. App. C, p. 25a). The petition for a writ of certiorari was filed on August 4, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether in the circumstances of this case the use of an earlier conviction, later vacated as tainted by illegal electronic surveillance, was proper.

2. Whether the government's evidence in this case was tainted by illegal electronic surveillance.

STATEMENT

1. Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of engaging in income tax frauds, in violation of Sections 7201 and 7206(1) of the Internal Revenue Code of 1954, and of conspiring to do so, in violation of 18 U.S.C. 371.[1] Following conviction, petitioner Cole was sentenced to one-year concurrent prison terms and fined $5,000 on each of the five counts on which he was convicted; petitioner Fischer was sentenced to three-month concurrent terms and fined $1,000 on each of the five counts on

[1] Count One charged all petitioners with conspiring to evade payment of their 1962 through 1964 income taxes. Counts Two and Four charged all petitioners with evasion of Cole, Fischer & Rogow, Inc.'s taxes for 1963 and 1964. Counts Three and Five charged Fischer with signing false corporate returns for 1963 and 1964. Counts Six and Seven charged Cole with evasion of his taxes for 1963 and 1964. (Pet. App. A, p. 2a.)

which he was convicted, and petitioner Cole, Fischer & Rogow, Inc. was fined $10,000 on each of the three counts on which it was convicted (Pet. App. A, p. 2a). The court of appeals affirmed (Pet. App. A, pp. 1a-23a).

2. The evidence, the sufficiency of which is not challenged here, is extensively set forth in the opinion of the court of appeals (Pet. App. A, pp. 3a-6a). It revealed that Cole and Fischer were the sole stockholders and principal officers of Cole, Fischer & Rogow, Inc. (hereinafter "CFR"), an advertising agency with offices in New York, New York, and Beverly Hills, California (Pet. App. A, p. 2a). It was shown that Cole and Fischer had caused CFR to pay, and take deductions for, items that were personal in nature, thereby understating the income of CFR, Cole and Fischer.

3. The largest item of fraudulent deduction consisted of legal fees and expenses paid by CFR in connection with a 1963 federal criminal proceeding against Cole in California for obstructing justice in violation of 18 U.S.C. 1503.[2] During the prosecu-

[2] The gist of that charge was that Cole had corruptly persuaded one Joel Benton, a former CFR employee, to claim the Fifth Amendment privilege against self-incrimination before a federal grand jury (Pet. App. A, p. 3a). See *Cole* v. *United States*, 329 F. 2d 437 (C.A. 9), certiorari denied, 377 U.S. 954.

Prior to the instant trial, Cole instituted a *coram nobis* proceeding in the California federal court to vacate that conviction on the ground that the indictment was the product of illegal electronic surveillance. The United States Attorney responded that the government could prove that its evidence in that case was untainted. However, after the verdict in this

tion's case, the government called one Joseph A. Ball, the attorney who had represented petitioner Cole at the California trial. In support of its theory that the legal expenses of that trial were not deductible as being business related, the government's examination of Ball established that he had been paid by CFR and that he had never discussed the deductibility of the fees with Cole.[3] Over objection, the defense then elicited testimony from Ball on cross-examination that Cole's involvement in the California case arose out of his connection with the business of CFR and that the government's theory in that case was that Cole had acted out of a desire to protect CFR's clients (Pet. App. A, pp. 7a-8a). The government was then permitted, over objection, to elicit Ball's recollection of specific testimony by Benton concerning remarks Cole had made to him (Pet. App. A, p. 8a).[4]

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case, the government withdrew its opposition to the *coram nobis* petition on the ground that it had discovered additional records which had convinced it that it could not prove that its evidence was not tainted. (Pet. App. A, pp. 12a-13a.)

[3] Pursuant to the directions of Cole and Fischer, CFR's payments of Cole's legal bills in 1963 were recorded in its books as legal expense payments in behalf of Candygram, Inc., a CFR client, and advertising fees subsequently paid by Candygram to CFR were treated in CFR's records as a reimbursement for the alleged Candygram expenses (Pet. App. A, pp. 3a-4a).

[4] Ball testified that Cole's remarks as related by Benton were (Pet. App. A, pp. 8a-9a, n. 7):

> (i) Well, remember Jimmy Hoffa's boys are mighty rough. I highly recommend that you get in touch with

The defense responded by eliciting from Ball that "at the close of the trial" the trial judge stated that if he had tried the case without a jury, he would not have wanted to rely upon Benton's testimony as compared to Cole's (Pet. App. A, p. 10a). The prosecutor, who had consistently stated that he did not intend to offer evidence of the California conviction, then stated that he now felt constrained to offer such evidence. The trial judge ruled that, since the defense had presented the trial judge's opinion of Benton's credibility, the jury's view of it could be presented to complete the picture, and the jury's verdict in the California case was admitted (Pet. App. A, p. 11a).[5]

4. Prior to trial, petitioners moved for dismissal of the indictment on the ground that the tax investigation leading to the indictment had resulted from illegal electronic surveillance and that the prosecution would rely on tainted evidence (Pet. App. A, p. 16a). The motion was denied without prejudice, subject to renewal at the close of the trial (*ibid.*).

Nate Stein right away. [An apparent reference to arrangements for Benton to submit a false affidavit to a Senate Committee, see Pet. App. A, *supra.*]

* * * *

(ii) Joel, even if you don't care about what happens to yourself, remember this, you have got a lovely wife and family. You wouldn't want want [sic] anything to happen to them, would you?

(iii) * * * Well, Doc Stacher is the No. 2 man in the syndicate and I am his boy.

[5] In his charge, the judge instructed the jury that the California conviction was not evidence of petitioner's guilt on the instant charges (Pet. App. A, p. 11a).

At the conclusion of the trial, the motion was renewed and, after a four-day hearing, denied in a comprehensive opinion. *United States* v. *Cole*, 325 F. Supp. 763. The evidence at the hearing revealed that from May 5, 1961, until August 29, 1962, the Federal Bureau of Investigation carried out illegal electronic surveillance in petitioner Cole's office at CFR.[6] The surveillance was in aid of an investigation of one Joseph "Doc" Stacher, believed to be a high figure in organized crime and believed to own undisclosed interests in Las Vegas gambling establishments. Cole was believed to be the "deputy" for the undisclosed interest held by Stacher (Pet. App. A, p. 15a; 325 F. Supp. at 764-765). During the time of this illegal surveillance, Benjamin Farber, an Assistant United States Attorney in Los Angeles, was conducting two grand jury investigations—one investigating Stacher and one concerned with whether Cole had committed perjury before the Stacher grand jury (325 F. Supp. at 765). On May 16, 1962, the surveillance intercepted a conversation between two of Cole's associates to the effect that Cole was charging personal expenses to CFR. Other surveillance logs contained similar items, in-

[6] The circumstances surrounding the illegal electronic surveillance and the investigation leading to prosecution here are extensively set forth in the opinion of the district court and in the opinion of the court of appeals (Pet. App. A, pp. 17a-22a). From November, 1962 until approximately April 28, 1963, illegal electronic surveillance was also carried out in the Fremont Hotel in Las Vegas, Nevada, a hotel in which Cole then had a proprietary interest (325 F. Supp. at 764-765).

cluding one relating to the legal fees in the California criminal case (Pet. App. A, pp. 15a-16a).

On June 21, 1962, Joel Benton came to Farber[7] and told him that Cole and Stacher were close business associates, that Cole owned hidden interests in Las Vegas gambling establishments, and that men from the hotel frequently delivered "gravy money" (money stuffed into cans under the gambling tables and never reported)—sometimes in six-figure amounts—to CFR (Pet. App. A, pp. 17a-18a; 325 F. Supp. at 770).[8] No such information had been produced by the electronic surveillance (325 F. Supp. at p. 770). Prior to Benton's disclosure to him, Farber had been receiving reports from FBI Special Agent Zellers, which were based in part on the surveillance, including a report that Cole was charging personal expenses to CFR (Pet. App. A, p. 19a). Later in the summer of 1962, Farber asked Louis Scalzo, an attorney in the Organized Crime Section of the Department of Justice, to request a "saturation" investigation of CFR by the Internal Revenue Service[9]

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[7] The government's lead to Benton was from a source independent of the illegal electronic surveillance (Pet. App. A, p. 18a, n. 15; 325 F. Supp. at 771).

[8] Benton's statement was recorded and ran over 70 pages in length (325 F. Supp. at 770).

[9] On October 3, 1962, the Department of Justice requested the Commissioner of Internal Revenue to undertake a "saturation" investigation and referred to the information that Cole was closely associated with Stacher and that he acted as Stacher's representative in connection with an undisclosed interest in a Las Vegas gambling establishment. This request contained no reference to taking deductions for personal expenses. (Pet. App. A, p. 19a.)

(Pet. App. A, p. 19a; 325 F. Supp. at 765). At the taint hearing, Farber testified that when he requested the investigation, "The Benton information and the information pertaining to the Las Vegas hidden interest was, to me, the most dramatic, and the most appealing" (Pet. App. A, p. 19a). On the other hand, he also admitted that "I * * * am sure that the other information [from the FBI reports] must have played some part" in his decision (*ibid*).

In October, November, and December of 1963, Francis S. Sullivan, an Internal Revenue agent assigned to investigate Cole's income tax matters, read the FBI reports (325 F. Supp. at 765). The analysis of CFR's records finally got under way on June 8, 1965, and continued through August 27.[10] The "saturation" investigation was conducted under the supervision of Revenue Agent Robert Zagorin. Neither he nor any

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[10] The investigation was delayed for a number of reasons. First, Farber asked agent Sullivan to hold off pending disposition of the obstruction of justice charge against Cole. (Pet. App. A, p. 21a, n. 18.) Second, after reviewing the FBI reports and other information, Sullivan informed his superior that he did not believe that there was an intelligence case on the facts contained in the reports and inquired whether the Department of Justice still wanted the case investigated (325 F. Supp. at 765-766). After a short interval, he was told to go forward with the investigation (325 F. Supp. at 766). Finally, Sullivan's attempts to examine Cole's and CFR's records were considerably delayed by legal proceedings. See *In re Cole*, 237 F. Supp. 274 (S.D.N.Y.), reversed, 342 F. 2d 5 (C.A. 2), certiorari denied, 381 U.S. 950. When the government's right to production of the records was established, the IRS was informed, for the first time, that all corporate records prior to 1963 had been destroyed (325 F. Supp. at 766).

of the agents who worked on the investigation, then or subsequently, knew of the illegal electronic surveillance or read the FBI reports. (Pet. App. A, pp. 21a-22a; 325 F. Supp. at 766.) The 1963 and 1964 corporate payment of personal expenses of Cole and Fischer, proven at trial, was uncovered in the review of the corporate books and records undertaken in the "saturation" investigation (325 F. Supp. at 771).[11]

ARGUMENT

1. Petitioners argue that admission in the government's case of the jury verdict in petitioner Cole's obstruction of justice case was error because that conviction was subsequently vacated on the ground that the government could not demonstrate that the evidence in the case came from an untainted source (Pet. 5-11).[12] This argument ignores the facts of this case and is without merit.

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[11] In such an investigation, every conceivable avenue of tax evasion is thoroughly examined (Pet. App. A, p. 20a, n. 17).

[12] Petitioners imply that the government deliberately and improperly delayed consenting to the setting aside of the prior conviction so that it could be used in this trial (Pet. 5-6). We note that, until the time petitioners introduced the trial judge's remarks, the government had consistently represented that it would not use the fact of the guilty verdict in that earlier trial (Pet. App. A, p. 11a). Moreover, the court of appeals did not accept the suggestion that the government purposely delayed in acknowledging the validity of the *coram nobis* proceeding (Pet. App. A, p. 13a, n. 11). Finally, as the court below noted, petitioners did not seek a continuance here until the *coram nobis* proceeding had been decided, or ever object to the evidence of the conviction on the ground that it was under constitutional attack (Pet. App. A, pp. 12a, 14a).

While the cases relied upon by petitioners (Pet. 7)[13] hold that a constitutionally invalid conviction cannot be used to support guilt, enhance punishment or impeach a defendant's credibility, other decisions of this Court have recognized that the defense may not unfairly take advantage of a constitutional restriction on the use of evidence in the government's possession. *Harris* v. *New York*, 401 U.S. 222; *Walder* v. *United States*, 347 U.S. at 62.[14] That is exactly the situation here. By eliciting the trial judge's remarks, the petitioners left the jury with an incomplete and misleading picture as to Benton's credi-

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[13] *Burgett* v. *Texas*, 389 U.S. 109; *United States* v. *Tucker*, 404 U.S. 443; *Loper* v. *Beto*, 405 U.S. 473.

[14] In *Harris* the defendant, charged with illegal narcotics sales, took the stand and denied selling narcotics on one occasion and testified that the other sale was of baking powder, not narcotics. On cross-examination, a prior inconsistent statement of the defendant, obtained without proper warnings as mandated by *Miranda* v. *Arizona*, 384 U.S. 436, was used to impeach him. In affirming the conviction, this Court said that "The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." (401 U.S. at 226.)

In *Walder*, this Court approved the use of evidence, previously suppressed because unlawfully seized, to rebut the defendant's statement on direct examination that he had never possessed narcotics. This Court there noted that "It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths" (347 U.S. at 65).

See also *Loper* v. *Beto*, *supra*, 405 U.S. at 482, n. 11.

bility. Under these circumstances, petitioners cannot be heard to argue that the government's hands were tied,[15] and it was proper to allow the government to complete the picture by introducing the jury's guilty verdict as evidence on the issue of Benton's credibility.

2. Petitioners also contend that information from the illegal electronic surveillance was the motivating force in the "saturation" investigation, and that the government's trial evidence was thus tainted (Pet. 11-19).[16] Both the district court and the court of appeals extensively analyzed the facts and rejected this contention.[17] We rely upon those opinions here.

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[15] As previously noted, petitioners did not object at trial to admission of the jury's verdict on the ground that it was constitutionally invalid.

[16] We note that the acts for which petitioners were prosecuted were, with one minor exception, not committed until after the illegal electronic surveillance was terminated (Pet. App. A, p. 16a).

[17] Petitioners make a number of assertions in their petition which, although not specifically answered in the court of appeals' opinion, were challenged by the government in the court below. Thus, for example, petitioners assert that Farber requested copies of Cole's income tax returns only seven days after the conversation relating to the charging of personal expenses was overheard. The government pointed out, however, that petitioners neglected to mention that Farber did not receive the FBI report covering this conversation until after he had requested the tax returns (citing [using petitioners' system] DXT 17, GXT 19, p. 35; TH. 88). Again, petitioners recite that Sullivan, the IRS agent, met with the FBI agent in charge of the surveillance on a number of occasions when the electronic surveillance was being conducted. The

We add only that petitioners' contention that the court below, in deciding this claim, "fabricated a hypothetical test" inconsistent with the decisions of this Court and the decisions of other circuits (Pet. 12-13, 19) is frivolous. Petitioners construct this argument on language in the opinion below to the effect that the government "would have" launched its "saturation" investigation even if no information had been received from illegal electronic surveillance (Pet. 12; Pet. App. A, p. 17a). It is asserted that this language reveals that the court below substituted its own speculation for what in fact occurred (Pet. 12, 19). This assertion, however, ignores the express language of the opinion below where the court said, relying upon its prior decision in *United States* v. *Paroutian*, 299 F.2d 486, "that the question is not whether the government would have, in the normal course of events, discovered the evidence by independent legal sources, but whether in fact they did" (Pet. App. A, p. 22a). The "would have" language was used to determine the *actual* cause of the "saturation" investigation. The government demonstrated that, in addition to evidence illegally obtained, it also possessed evidence from an independent source. The evidence from the illegal source was not enough to

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government pointed out, however, that both men testified that they had never discussed Cole on those occasions (citing TH. 148, 417). Finally, petitioners set forth what a number of people thought was the basis of the investigation (Pet. 17-18). But it was Farber who had requested the investigation and he testified as to his reasons for doing so.

initiate the "saturation" investigation leading to the challenged evidence; it was the evidence from the independent source that was sufficient.[18] Thus, the discovery of evidence used at this trial was not tainted by the illegal electronic surveillance.

Neither *United States* v. *Bacall*, 443 F.2d 1050 (C.A. 9), certiorari denied, 404 U.S. 1004, nor *United States* v. *Ruffin*, 389 F.2d 76 (C.A. 7), relied upon by petitioners (Pet. 19), is in conflict with the ruling below. In *Ruffin*, the court of appeals rejected the government's argument that evidence discovered after an illegal arrest was admissible because in plain view, and noted that it was purely speculative that the defendant's offenses *would have* come to light but for the unlawful arrest. *United States* v. *Ruffin*, *supra*, 389 F.2d at 79. The statement in *Bacall* (443 F.2d at 1057) that "The question to be answered is not whether the * * * [evidence] would have been discovered in the absence of the seizure," must be read in the context. That case did not involve leads in the hands of the government both legally and illegally obtained. Rather, it involved a situation where the court assumed, in the sentence immediately preceding the quoted statement, "that illegal seizure *was* a 'but for' cause of the * * * investigation." That is clearly not the situation here. Indeed, the court

[18] Thus, the court of appeals found that whereas the charging of personal expenses to a business would not warrant a "saturation" investigation, failure to disclose the receipt of money, sometimes in six-figure amounts, from a person believed to be a figure in organized crime would warrant such an investigation (Pet. App. A, p. 20a).

in *Bacall* specifically recognized that where challenged evidence is discovered through utilization of some legally obtained leads as well as some illegally obtained leads (a situation somewhat similar to that here), the substantiality of the legally obtained leads may influence the determination of whether the evidence should be admitted. *United States* v. *Bacall*, 443 F.2d at 1056.

In short, the courts below properly determined the factual cause of the "saturation" investigation, and there is no conflict among the circuits on this point.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

JOHN P. BURKE,
ROBERT E. LINDSAY,
Attorneys.

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